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LABOUR & EMPLOYMENT DEPARTMENT

NOTIFICATION

The 23rd August 2007

No. 9893-1i/1-(B)-42/2006/LE.—In pursuance of Section 17 of the Industrial Disputes Act, 1947 (14 of 1947), the award dated the 28th June, 2007 in I.D. Case No. 46 of 2006 of the Presiding Officer, Labour Court, Bhubaneswar to whom the industrial dispute between the Management of M/s. Utkal Co-operative Banking societies Ltd., Bhubaneswar and its workmen represented by the Association was referred for adjudication is hereby published as in the schedule below :—

SCHEDULE

IN THE LABOUR COURT : BHUBANESWAR.

INDUSTRIAL DISPUTE CASE No. 46 OF 2006

Dated the 28th June, 2007

Present:

Shri S.K. Mohapatra, O.S.J.S. (Jr.Branch),
Presiding Officer,
Labour Court,
Bhubaneswar.

Between:

The Management of M/s. Utkal
Co-operative Banking Societies
Ltd., Bhubaneswar.

... First-Party — Management.

And

Its Workmen represented
by the Association.

... Second-Party — Workmen

Appearances :

Shri P. C. Swain. ... For First-Party — Management.

Shri B.R. Mallick. ... For Second-Party— Workmen.

AWARD

The Government of Orissa, Labour & Employment Department referred the present dispute between the Management of M/s. Utkal Co-operative Banking Societies Ltd., Bhubaneswar and its workmen represented by the Association under Notification No. 1057/LE., dated the 31st January, 2003 vide Memo No. 4484(7)/LE., dated the 6th June, 2006 for adjudication by this Court.

2. The terms of reference by the State Government is as follows :

- (A) “ Whether the workmen of M/s. Utkal Co-operative Banking society Ltd., Bhubaneswar are eligible for *ex gratia* payment for the year 2001-02 and 2002-03? If so, what should be the details ?”
- (B) “ Whether the workmen of M/s. Utkal Co-operative Banking Society Ltd., Bhubaneswar are entitled to the medical advance ? If so, what should be the details ?

3. Shorn of all unnecessary details, the case of the workmen is as follows :

The workmen are employees of Utkal Co-operative Banking Society Ltd., Bhubaneswar (hereinafter referred to as the Management Bank). Since the inception of the Management Bank it started earning profit which increased progressively in each year. The amount of profit in the years 2001-02 was Rs. 1,0265,043:05 and similarly the amount of profit for the year 2002-03 was Rs. 82,70,790:64. The workmen were being paid *ex gratia* in lieu of bouns to the workmen and also the Management was paying them medical advance. However, the Management arbitrarily stopped payment of *ex gratia* and medical advance to the workmen without any notice of change as required under Section 9-A of the Industrial Disputes Act, 1947 (hereinafter referred to as the I. D. Act). On a earlier occasion when the Management arbitrarily reduced the rate of bonus to the workmen from 20% to 16% in the year 1990-91 and further slashed it down to 8.33% in the year 1991-92 even though allocable surplus at the disposal of the Management was sufficient, the workmen raised an industrial dispute which culminated in I.D. Case No. 34 of 1993 in the Court of the Industrial Tribunal, Orissa, Bhubaneswar. In the said case the

learned Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar passed an Award (Ext.7) justifying the demand of the workmen for payment of bonus at the rate of 20% from 1990-91 and onwards and further directed that as long as Section 11 of the Payment of Bonus Act, 1965 is attracted and the allocable surplus exceeded the amount of minimum bonus, the bonus shall continue to be the amount in proportion to the salary of wage earned by the employees. As against the order of the learned Presiding Officer, Industrial Tribunal, Orissa, Bhubaneswar. The Management preferred O.J.C. No. 2934 of 1996 before the Hon'ble High Court of Orissa. In O.J.C. No. 2934 of 1996, the Hon'ble High Court of Orissa vide judgment dated 6th December, 1996 upheld the direction of the learned Industrial Tribunal for giving bonus 20% to the workmen for the accounting year 1990-91 and further held that the learned Tribunal went beyond its jurisdiction in declaring that the workmen are entitled to get bonus even after the year 1990-91 and allowed the writ petition in part with such direction. After the judgment of the Hon'ble High Court of Orissa, the Management released the differential bonus at the rate of 4% for the years 1990-91 to 1993-94 and thereafter paid 20% *ex gratia* for the year 1994-95. As per the resolution of Annual General Body Meeting of the Management Bank, the Management paid *ex gratia* @ 20% subject to maximum amount of Rs. 5,000/- every year to the workmen. Thereafter the Management suddenly stopped payment of *ex gratia* to the workmen with effect from the year 2001-02 and thereby deprived a bonafide right and entitlement of the workmen to get bonus/*ex gratia*. In the Annual General Body Meeting held on 29th June, 2003 the Management ordered payment of *ex gratia* to the employees not exceeding an amount of Rs. 6,000/- or an amount of 75% of one month's basic pay whichever was less. Such decision of the Management was contrary to the mandate of Statute and Bye-law of the Co-operative Society in accordance to which the Management Bank was functioning. Further the workmen were getting medical advance since the year 1983 but the Management without any valid reason stopped payment of medical advance to the workmen. On these averments the workmen have prayed for realization of *ex gratia*/bonus to the employees and also for payment of medical advance to them.

4. In its written statement the Management has contended that the Management Bank is a registered Co-operative Banking society guided by the provisions of Orissa Co-operative Societies Act, 1962 besides the Bye-laws of the Bank. From the date of commencement of the payment of Bonus Act, 1965, the employees of the Bank were being paid minimum statutory bonus @ 8.33% and also variable additional bonus for each accounting year as per the decision of the General Body of the Banking Society. The

Committee of the Management passed resolution on 16th December, 1996 to pay bonus to the employees for the years 1991-92 to 1994-95 as per Section 11 of Payment of Bonus Act, 1965. since the provisions of Payment of Bonus Act, 1965 does not permit payment of bonus to employees drawing salary beyond Rs. 3,500/- per month, the Management proposed in the General Body meeting on 29th June, 2003 to appropriate a sum of Rs. 3,12,000/- towards payment of *ex gratia* to the employees of the Bank and after due verification from the President of the Bank such amount was decided to be paid as *ex gratia* to the employees subject to the condition that no employees would get any amount exceeding Rs. 6,000/- or an amount 75% of one month's basic pay of an employee which ever was less and accordingly order was passed vide Memo No. 2953, dated the 18th September, 2002. Subsequently however, the General Body Meeting held on 28th March, 2004 decided to divert the fund in question to Building Fund instead of utilizing the same for payment of *ex gratia* to the employees as because the same was not a statutory obligation on the part of the Management.

So far as medical advance is concerned the stand of the Management is that the workmen were getting medical advance equal to one month's basic pay since the year 1983 and the said medical advance was being recoverable in 10 consecutive monthly installments but subsequently the medical advance was stopped as because the workmen were entitled to get medical reimbursement for the amount spent by them towards medical treatment of themselves or their dependents. On these averments the Management has sought for rejection of the demands of the workmen.

5. On the aforesaid pleadings of the parties, the following issues have been framed for determination.

ISSUES

- (A) Whether the workmen of Utkal Co-operative Banking Society Ltd., Bhubaneswar are eligible for *ex gratia* payment for the years 2001-02 and 2002-03 ? If so, what should be the details ?
- (B) Whether the workmen of M/s. Utkal Co-operative Banking Society Ltd., Bhubaneswar are entitled to the medical advance ? If so, what should be the details ?

6. Issue No. (A) :— The workmen of this case have pleaded that the employees of the Bank Society i.e. the Management had been receiving *ex gratia* at the rate of

Rs. 6,000/- per year and that the Management suddenly stopped payment of *ex gratia* without any kind of notice to the workmen and without giving any reasonable opportunity of hearing and thereby acted arbitrarily and illegally in violation of the provisions of Section 9-A of the I. D Act. It has also been pleaded that payment of *ex gratia*/Bonus/Additional Bonus being in the nature of allowance can never be varied in violation of the provisions of law contained in the I.D. Act and that *ex gratia* which was being paid recurringly in each year is a bonafide entitlement of the workmen. Now it is to be examined from the evidence on record and with reference to relevant provisions of law as to how far the workmen of this case are entitled to get *ex gratia* as a matter of customary privilege and as to whether the Management was bound under Section 9-A of the I. D. Act to issue notice to the workmen before stopping payment of ex-gratia.

7. Before embarking upon discussion on the subject of payment of *ex gratia* to the workmen by the Management it is to be made clear that the Hon'ble High Court of Orissa vide Judgment dated the 6th December, 1996 in O.J.C. No. 2934 of 1996 (Ext.8) have not stated anything about payment of *ex gratia* although the Management vide its order under Ext.2 released *ex gratia* to the workmen for five years from 1990-91 to 1994-95 while releasing differential Bonus to the workmen. Although in Ext. 2 it has been noted by the Management that in view of the Judgment of the Hon'ble High Court of Orissa in O.J.C. No. 2934 of 1996, the employees are allowed to draw the differential Bonus/*ex gratia* @ 20% for the years 1990-91 to 1994-95, a close reading of Ext.8 shows that the Hon'ble High Court of Orissa have not stated anything about the payment of *ex gratia* to the employees in Ext. 8. It is very important to note that the *ex gratia* is completely different from Bonus. While Bonus is a matter or right of the workmen working under undertakings where Payment of Bonus Act, 1965 is applicable, *ex gratia* as its dictionary meaning suggests is an act of grace of the Management and it does not confer any entitlement as such on the workmen. In the instant case the claim of the workmen is that they had been getting *ex gratia* every year till it was suddenly stopped by the Management. Now it is to be examined if such payment of *ex gratia* to the workman was a customary privilege so as to come within the ambit of Section 9-A of the I.D. Act. The Hon'ble Apex Court in the case of WORKMEN V. KETTLEWELL BULLEN & COMPANY LTD. reported in (1994) 2 Supreme Court Cases 357 while dealing with the question of Customary bonus held to the effect that :

“ A. Labour Law- Bonus – Customary bonus – Circumstances justifying inference of – Where irrespective of profit or loss, bonus was paid before Puja festival over an unbroken series of 14 years and the rate of payment was uniform for the last nine years, held, that there was uniformity of rate for a sufficiently long period to justify the inference that the payment was customary or traditional bonus – The difference of the rate of earlier years, held, immaterial. “(Placitum).”

Although Bonus is completely different from *ex gratia* and both are not similar things, while deciding as to whether any privilege is a customary privilege or not it is to be seen as to whether the same was being extended to the workmen over and an unbroken sufficiently long period so as to create a customary right of privilege on the part of the workmen. The evidence of W.W.1 is completely silent as to since when the workmen were getting *ex gratia*. The Charter of Demand Ext.1 is also silent in the matter. Ext.2 which is a Xerox copy of the office order dated the 20th December, 1996 of the Management shows that the Management had ordered payment of differential Bonus/*ex gratia* to the workmen for five years in view of the Judgment of the Hon'ble High Court of Orissa in O.J.C. No. 2934 of 1996. Ext.3 also relates to ex-gratis of payment sheet showing payment of *ex gratia* to the workmen from 1990 to 1995. The Chief Executive in charge of the Management has been examined as M.W.1 in this case. M.W.1 in his evidence has stated that the employees have been given *ex gratia* from the year 1990-91 to the year 2000-01. This evidence of M.W.1 clearly shows that for long ten years the workmen of this case had been getting *ex gratia* from the Management without interruption. Thus is a way it can be said that the workmen were getting *ex gratia* from the Management by way of customary privilege and therefore, the Management was debarred under the provision of Section 9-A of the I.D. Act from stopping *ex gratia* payment to the workman suddenly without giving any notice to the workmen who were likely to be effected by such a change effected by the Management. The provision under Section 9-A of the I.D. Act provides as follows :

“ Notice of change- No employer, who proposes to effect any change in the conditions of service applicable to any workman in respect of any matter specified in the Fourth Schedule, shall effect such change-

NOTES : Change of service conditions by rules made by Registrar under Section 55 of the H.P. Co-operative Societies Act, is not violative of Section 9-A- (1982)L.I.C. 1435. Change of weekly rest day does not come within the

mischief of Section 9-A nor does it fall within Schedule IV of the Act – 1982 L.I.C. 1354.

Semination amounting to retrenchment – effect of – see - A.I.R. 1982 Section 854.

- (a) Without giving to the workmen likely to be effected by such change a notice in the prescribed manner of the nature of the change proposed to be effected; or
- (b) Within twenty-one days of giving such notice :

xxx

xxx

xxx

Nothing has been brought to the notice of this Court to show that the present Management is exempted under Section 9-B of the I.D. Act from the application of Section 9-A of the I. D. Act. The only evidence of M.W.1 is that they could not give *ex gratia* to the employees in view of bars under Exts. A to D. Ext. A is the Bye-law of the Management Bank where there is no provision for payment of *ex gratia*. Ext. B is the copy of the proceeding of the 62nd Annual General Meeting held on 29th June, 2003. in Ext. B vide Agenda No.3 a sum of Rs. 3,12,000/- was appropriated towards payment of *ex gratia* to the employees of the Management Bank from out of the net profit for the year 2001-02. Ext. C relates to audit objection regarding payment of the said amount of Rs. 3,12,000/- under Ext. B unless and until the Bye-law of the Bank is changed and Ext. D is the circular relating to payment of *ex gratia* to the employees of Co-operative organization on fulfilling certain pre-conditions out of net profit of the Society. The conditions are the net profit to be considered must be (i) the annual net profit as shown in the audited Balance Sheet, (ii) there must be provision to the effect in the Bye-laws regarding payment of *ex gratia* and (iii) if such net profit is available at the disposal and is approved by the General Body Meeting. In Ext.D it has been further mentioned that payment of *ex gratia* without fulfilling the above three pre-conditions are illegal and that the Committee of Management and the Chief Executive would be held responsible for quantum of loss on such payment. Out of the impediments mentioned by M.W.1 regarding payment of *ex gratia* to the workmen it is seen that for the year 2001-02 there was sufficient allocable surplus and therefore the Annual General Meeting vide Ext. B had appropriated the amount of Rs. 3,12,000/- for payment of *ex gratia* to the Bank employees for the year 2001-02 and such payment has been approved by Annual General Meeting. The only remaining impediment is that there is

no provision of payment of *ex gratia* in the Bye-laws of the Management Bank but such impediment can be overcome by making suitable amendment to the Bye-laws of the Management Bank. Therefore payment of *ex gratia* at the rate of Rs. 6,000/- on 75% of basic pay which ever is less to the workmen for the year 2001-02 would not be any problem for the Management only if the Management take effective steps to change the Bye-laws of the Management Bank. More over payment of *ex gratia* as already discussed has acquired a nature of customary privilege and its stoppage without notice to the workmen is barred under Section 9-A of the I. D. Act. The question of withdrawal of the customary privilege can be decided by the Labour Court as per the Second Schedule of the I.D. Act. On the question of payment of *ex gratia* for the year 2002-03 there is no evidence before this Court as to whether in that year the Management Bank had sufficient allocable surplus or not. Further more as available from Ext.C that the Management Bank had not provided *ex gratia* for the year 2002-03. In the absence of any evidence that the Management had sufficient allocable surplus for the year 2002-03 for payment of *ex gratia* no direction can be given to the Management for payment of *ex gratia* for the year 2002-03. Hence it is held that the workmen are entitled to get *ex gratia* at the rate of Rs. 6, 000/- or an amount 75% of one month's basic pay of the employee which ever is less for the year 2001-02 after the Management taking suitable steps for changing of the Bye-laws of the Management Bank and it is further held that so far as payment of *ex gratia* for the year 2002-03 is concerned the employees are not entitled to such payment since no such provision has been made by the Management Bank for the year 2002-03, and there is no evidence of sufficient allocable surplus for the said period for issuing of such a direction to the Management Bank in the matter for the year 2002-03. Hence the issue No. (A) is answered accordingly.

8. Before parting with the issue No. (A) it should be made clear that although because of long and un-interrupted payment of *ex gratia* to the workmen by the Management Bank it has assumed the character of a customary privilege but it does not create any enforceable right in favour of the workmen. This is so for more reasons than one. Firstly the meaning of the word *ex gratia* by itself means a grace on the part of the Management and it is not an entitlement on the part of the person receiving *ex gratia* and secondly while Bonus is a statutory right of the workmen, *ex gratia* is completely different from Bonus and never a right in itself though it may constitute customary privilege in given circumstances and thirdly Section 9-A of the I. D. Act does not speak about any right of the workmen to any customary privilege and it does not bar the Management not to

discontinue such customary privilege but it only enjoins the Management to issue notice to the workmen before discontinuing such customary privilege. So there can be no inference that failure of the Management to comply with the provision under Section 9-A of the I.D. Act creates a perpetual right on any customary privilege on the part of the workmen. Even when Bonus like Puja Bonus is given a matter of customary right, the same is adjusted from the statutory Bonus when such statutory Bonus is paid. In the instant case payment of *ex gratia* for the year 2001-02 has been allowed only because the Management vide Ext.6 had appropriated such amount for the year 2001-02 and because the Management vide Ext. 4 have already decided for release of *ex gratia* to the employees for the year 2001-02.

9. Issue No. (B):— The workmen have pleaded that they had been getting medical advance since the year 1983 till the year 2003, the Management stopped payment of medical advance in the year 2003 without any legal and valid reason and without giving any kind of legal notice to the workmen before stopping of medical advance. To this pleading, the Management in its written statement has pleaded that since the workmen are getting medical reimbursement for the medical expenses incurred by them, they are not entitled to any medical advance. Before answering this issue it is to be seen as to whether such medical advance has assumed the nature of customary privilege or not. In this context the evidence of W.W.1 is completely silent. During his evidence W.W.1 who is the General Secretary of the employees Association has not whispered a single word about medical advance. Further more no documentary evidence has been proved by the workmen to show that medical advance was a customary privilege of the workmen. The evidence of M.W.1 also does not throw any light on this issue. Pleadings in themselves can not take the place of legal proof unless the same is specifically admitted by the other side. In the instant case the Management has specifically pleaded that the workmen have no right to get medical advance. Thus there is no evidence on record to show that medical advance in question was a customary privilege of the workmen of this case and therefore, its discontinuance by the Management without any notice to the workmen can not be said to be a violation of Section 9-A of the I. D. Act. Hence it is held that the workmen are not entitled to medical advance as such. The issue No. (B) is answered accordingly.

10. In view of my answers to issue Nos. (A) and (B), the reference is answered as follows :

(A) – The workmen of M/s. Utkal Co-operative Banking Society Ltd., Bhubaneswar are eligible for *ex gratia* payment for the year 2001-02 only at the rate of Rs. 6,000/- or 75% of the basic pay which ever is less and that they are not entitled to get the ex-gratia for the year 2002-03. The Management is to pay *ex gratia* for the year 2001-02 to the workmen forthwith after making suitable amendment to its Bye-laws. (B) – The workmen of M/s. Utkal Co-operative Banking society Ltd., Bhubaneswar are not entitled to the medical advance.

Dictated and corrected by me.

S. K. Mohapatra
28-6-2007
Presiding Officer,
Labour Court,
Bhubaneswar.

S. K. Mohapatra
28-6-2007
Presiding Officer,
Labour Court,
Bhubaneswar.

By order of the Governor

N. C. RAY
Under-Secretary to Government